

REMARKS

This paper is filed in response to the Office Action mailed December 11, 2008 that made a restriction requirement between the following groups:

Group I – claims 1-7, 13-16 and 24-26 directed to polypeptides, compositions, animal feeds and methods of killing or inhibiting growth of microbial cells using a polypeptide; and

Group II – claims 8-12 and 21 directed to polynucleotides, constructs, expression vectors, host cells, and methods of producing a polypeptide, and transgenic cells.

In response to the restriction requirement, Applicants elect Group I.

Applicants were also requested to elect “one” amino acid sequence from SEQ ID NOs: 1, 2 and 58 with defined amino acid residues at each position. This requirement is respectfully traversed.

Under PCT Rule 13.1, “[t]he international application shall relate to one invention or to a group of inventions so linked as to form a single general inventive concept....” PCT Rule 13.2 further provides that unity of invention is fulfilled “only when there is a technical relationship among those inventions involving one or more of the same or corresponding special technical features. The expression ‘special technical feature’ shall mean those technical features that define a contribution which each of the claimed inventions, considered as a whole, makes over the prior art.”

Under these standards, Applicant submits that the restriction requirement made in the Office Action is improper.

The present invention is directed to antimicrobial peptides, compositions comprising same, and methods of using same. The polypeptides are defined by an amino acid sequence, and are structurally related. Applicants therefore submit that the claims satisfy the unity of invention requirement.

Significantly, no objection to unity of invention was raised at any point of the PCT prosecution.

Moreover, it is well settled that 35 U.S.C. 121 does not provide legal authority for the USPTO to refuse to examine a broad generic claim. See, *In re Weber*, 198 U.S.P.Q. 328, 331 (C.C.P.A. 1978); *In re Haas*, 179 U.S.P.Q. 623, 624-625 (C.C.P.A. 1973) (*In re Haas I*); and *In re Haas*, 198 U.S.P.Q. 334-336 (C.C.P.A. 1978) (*In re Haas II*). As stated in *Weber* (198 U.S.P.Q. at 334):

The discretionary power to limit one applicant to one invention is no excuse at all for refusing to examine a broad generic claim – no matter how broad, which

means no matter how many independently patentable inventions may fall within it.

Moreover, where the USPTO makes a restriction requirement of a generic claim, the restriction requirement amounts to a rejection of the claim. See *In re Haas I* (179 U.S.P.Q. at 625):

We find that the action taken by the examiner did in fact amount to a rejection.... Those claims were withdrawn from consideration not only in this application but prospectively in any subsequent application because of their content. In effect there has been a denial of patentability of the claims. Presumably only by dividing the subject matter into separate, and thus different, claims in plural applications could an examination of the patentability of their subject matter be obtained.

If the instant restriction requirement is maintained, Applicants will not be able to protect their generic invention. See *Weber*, 198 U.S.P.Q. at 331 ("If ... a single claim is required to be divided up and presented in different applications, that claim would never be considered on its merits. The totality of the resulting fragmentary claims would not necessarily be the equivalent of the original claim. Further, since the subgenera would be defined by the examiner rather than by the applicant, it is not inconceivable that a number of the fragments would not be described in the specification.")

For the foregoing reasons, Applicants submit that the requirement to elect a species is improper.

In order to be fully responsive, Applicants hereby elect the species of SEQ ID NO: 3. Claims 27-39 read thereon. Applicants hereby reserve the right to file divisional applications directed to the nonelected subject matter.

The Examiner is hereby invited to contact the undersigned by telephone if there are any questions concerning this response or application.

Respectfully submitted,

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